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In The
Supreme Court of The United States

OCTOBER TERM, 1943

NO. 196

WILLIE GRAY GARRISON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner is indebted to counsel who prepared the brief in opposition for a fair and correct statement of the legal principles relied upon by respondent; and for the only consideration to date, either judicial or administrative, which takes into account the provisions of the statute under which he was convicted.[1] However, petitioner had hoped that such a consideration would lead the Solicitor General to confess error and join in the prayer of the petition. An examination of the brief leads to the conclusion that what was set forth in the petition and said in support thereof was not sufficiently explicit, with the result that opposing counsel have failed to reach the real questions presented, or to answer the propositions relied upon.

[1]Judge Sibley's dissenting opinion (R. 154, 135 F. 2d. 877, 878) is based upon the entire lack of evidence of conspiracy; and his position is equally sound under Criminal Code Section 19 or Section 37.

QUESTION PRESENTED

Petitioner pointed out ten questions properly addressed to the consideration of this court (P. 5-7), none of which were thought to overlap; while respondent states only one question which, as stated, is not germane to any of petitioner's ten, and is not of the character and type to be noticed by this court, but should be left to the final determination of the intermediate court of review. If the question presented here is whether the trial court submitted the case to the jury on the erroneous theory that the question for its determination was whether or not the defendants ("or either of them") oppressed, threatened or intimidated the victim, as stated (Br. 2); then respondent admits that it was so charged, and the argument is such as to, and should, invoke the second sentence of Judicial Code Section 269 (28 U.S.C.A. 391). Since petitioner filed his motion for a new trial in the trial court (R. 14), assigned error on appeal for its denial (R. 121 123(13)), and renewed the motion in the Court of Appeals assigning additional grounds raising questions of law; the question presented here can best be formulized as follows:

> On the record presented here, should the Circuit Court have entertained or reviewed the proceedings on the motion for a new trial, under the first sentence of Judicial Code Section 269; or should it have affirmed, as contended by respondent, or reversed and ordered the defendants discharged, as contended by petitioner, either of the latter results being under the second sentence of Judicial Code Section 269?

STATUTE INVOLVED

Section 269 of the Judicial Code (28 U.S.C.A. 391) provides as follows:

"All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

STATEMENT

Notwithstanding the erudition and attitude of fairness manifest in respondent's brief in opposition, counsel, like the jury, the trial court, and Circuit Court of Appeals, appear to have been misled by the course and conduct of the proceedings. It is stated (Br. 4) that petitioner was engaged in the manufacture of illicit liquor. Whatever the facts may have been, the record does not sustain this assertion. Petitioner was not on trial for this charge, but the jury, the trial court, the Court of Appeals, and now the Solicitor General of the United States assume it to be true, as the background for a civil rights conspiracy, on the following circumstances:

1. An agent from Mobile, Alabama, and an agent from Meridian, Mississippi, destroyed a still in Choctaw County, Alabama, about three miles from petitioner's premises in Sumter County, Alabama, and arrested petitioner and charged him with it (R. 18-20). (Note that Choctaw County is in the Southern District of Alabama, while Sumter County is in the Northern District, (28 U.S.C.A. 142)).

2. The victim (J. G. Dorough) gave information to agents from Tuscaloosa, Alabama, while in Sumter County (all in the Northern District, R.2) that petitioner was engaged in certain acts

constituting liquor violations; but when the agents undertook to verify some of this information, they were unable to do so. (R. 21-22, 23-24).

3. The alleged victim (J. G. Dorough) testified at the trial to the particulars of the information given by him to agents, and also gave primary evidence (testimony) to the circumstances which led him to believe the information true, but which circumstances, if true, did not negative reasonable hypotheses other than that petitioner was engaged in the manufacture of illicit liquor. (R. 65-67.)

The probative force, either as to the manufacture or conspiracy, of the first of these circumstances is not apparent. The second adds nothing to the third. The third is the unverified suspicion of one individual based on circumstances which do not add to their weight. Thus, petitioner has been compelled to contend for his right to liberty under the stigma of belief by all who were so positioned as to be able to afford relief, that he was engaged in large operations involving commercialized violations of the Revenue Laws. He could not defend against this belief, because he was not charged with that offense. He could not disprove the charge, because no attempt was made to prove it against him. Although irrelevant, now it is asserted an accomplished fact.

Respondent states (Brief 4) that on numerous occasions the defendant Walker had been seen in the company of petitioner in petitioner's truck and around his home, as well as in the woods. The record cited in support (R. 66) reads as follows:

> "Sometimes when Garrison passed my house there was somebody with him. These people were Earliest Walker and P. G. Walker — they were brothers. I do not know whether Earliest Walker worked for Garrison or not, and I do not know what

he was doing riding with him. I have seen Earliest Walker around Garrison's home and have seen him in the woods with Garrison. He was just working in the woods."

Apparently, in Respondent's lexicon "sometimes" is synonymous with "on numerous occasions". Apparently this testimony is relied upon to defeat the concise analysis and clear conclusion announced in the dissenting opinion (R. 154). However, if Dorough's testimony be given its greatest weight, it proves too much.

If petitioner was engaged as testified, and was disposed to oppress and intimidate even the white men believed to be associated with agents clothed with the authority of the Federal Government; it is hardly believable that he would pause to conspire, confederate or agree with the negro alleged to be closely associated with and employed by him, and also sometimes suspected of being associated in the manufacture of illicit liquor. Walker's acquiescence would not have been by agreement but by compulsion. Even the alleged statements with reference to Earl Brunson (R. 32), which could have no relation to Dorough, would have been made in fear that he must anticipate "his white man's" wishes.

With so much of pretext and assumption, cannot this court pierce the veil of judicial fiction, and the fog of professional etiquette; and view the facts, either as they are or as they must be confined for purposes of review? Petitioner and Dorough both lived in Sumter County, in the Northern District of Alabama. Dorough furnished much information to agents of the Alcohol Tax Unit designed to result in the arrest and conviction of petitioner on a charge of violating the liquor laws. These agents were unable to verify this information. Agents from Mobile and Meridian destroyed a still over the line in Choctaw County, in the Southern District of Alabama. This still proves to be only three miles

"from the premises" of petitioner. On the information furnished by Dorough, petitioner was arrested for this still. If guilty, he should have been prosecuted in the Southern District. Whether he was or not, the record does not show.

If petitioner was guilty of transporting liquor to Meridian, in the Southern District of Mississippi, from the still in the Southern District of Alabama; and of transporting materials to the still on his return, and on these trips, passed Dorough's house in the Northern District of Alabama at a high and reckless rate of speed; he could have been prosecuted for these offenses in all or either of these districts, and the prosecutors could have multiplied counts and offenses to their complete satiation.

Instead of prosecuting petitioner on liquor charges, either in the district where he is charged with manufacture, or in the district where it is suspected by Dorough that he sells; a charge of conspiracy is laid in the third district, and with him is joined a negro who fortuitously was with him on the date alleged. More prejudice is injected against him by testimony (by Dorough) that he associated with negroes. Testimony is introduced to prove an overt act, but none to show conspiracy. A heinous overt act is proved to the satisfaction of the jury by the testimony of Dorough, others suspected of liquor violations and their relatives. There is no evidence of participation by the negro Walker, but this should be no deterrent to the jury, if it appears that they can not convict one without the other. If any juror had misgivings about Walker, they could be allayed by assurances from others that the negro was just a tool in the white man's hands; and then, too, would not a conviction under this statute disfranchise him and render him ineligible for a place of honor, profit and trust? For agents and prosecutors intent on vendicating themselves on the vast amount of "evi-

dence" furnished by Dorough, which the agents and prosecutors in the Southern Districts of Alabama and Mississippi had failed to use successfully, the case was ideal for the use of a negro as a "dummy defendant". The negro would be compelled to rely upon the white for aid in his defense, and the more cooperation they displayed, the stronger the suspicion of conspiracy would grow in the minds of the jury. Dorough would testify to numerous occasions when he gave voluminous information. Each bit would appear to be additional provocation to petitioner. Soon the apparent provocation would amount to proof of the act in the minds of the jury. The only element lacking would be proof of conspiracy, and the case might have failed on this point, except for the charge of the court, which respondent admits is erroneous.

ARGUMENT

Respondent concedes the following propositions set forth in the petition and in support thereof:

1. That the indictment was drawn on an erroneous theory of law (Br. 8-9).

2. That both counts of the indictment charge one and the same conspiracy (Br. 8).

3. That the court submitted to the jury the question of whether or not overt acts had been committed, and that this portion of the Court's charge, considered alone, made this question the sole issue in the case. (Br. 7).

4. That the charge to the jury was erroneous (Br. 7-10).

However, respondent contends that no prejudice resulted from this erroneous proceeding. Hence, reliance is had upon the second sentence of Judicial Code Section 269 (28 U.S.C.A. 391). Petitioner's right to move for a new trial on questions

of law, in the Circuit Court of Appeals is not questioned. It is not denied that the Circuit Court of Appeals erroneously failed to review the motion for a new trial, either as filed in the trial court, or as renewed and supplemented in the Circuit Court of Appeals.[2] It is not contended that the rule emanating from this court should not be re-examined and restated. It is not suggested that the decisions of the various circuit courts of appeal are not in hopeless confusion.

Respondent must rely upon the second sentence of Judicial Code, Section 269, which says in part:

> "On the hearing of any appeal . . . or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties."

It was this section which petitioner invoked when he filed his motion for a new trial with the Circuit Court of Appeals. There is nothing in the record to show that the motion was considered by that court without the bounds of the erroneous or inaccurate rule that "The grant or refusal of a new trial rests in the sound discretion of the trial court, and its action thereon is not subject to review on writ of error or appeal", which had become axiomatic among the circuits, and is most honored in its breach.

Petitioner contends that under the statutory provision relied upon by respondent, he should be discharged under the

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[2]The argument (Br. 13-14) that the motion for a new trial was passed upon (not considered) is based upon a statement in the opinion and order which does not show consideration by the court; and to say that the court did consider the motion and then pass upon it, is to assume that the court ignored the mass of jurisprudence on the power of the Appellate Court in such cases.

mandate of this court, and should have been discharged under the mandate of the Circuit Court of Appeals. This sentence of the statute is as explicit in its mandate that the court "shall give judgment after an examination of the entire record" as it is on the point that the examination of the record shall be "without regard to technical errors, defects, or exceptions". The question of what is "substantial" and what is "technical" is too large to be considered on petition for certiorari. Clearly, petitioner is entitled to have this matter considered, either in this court, or in the Circuit Court of Appeals.

Petitioner's contention that the jury was not misled by the admittedly erroneous charge ignores the natural and direct implications and inferences arising from the record, and can be supported only by speculation and conjecture. The undeniable facts are that:

1. The jury acquitted as to the identical conspiracy for which petitioner stands convicted.[3]
2. The court told the jury that the overt act was a substantive offense, and that the question for the jury to determine was whether or not this "Offense" had been committed (R. 112).
3. The Charge of the Court does not retract these two (not one) erroneous statements, but when read as a whole (R. 111-118), indicates that the trial had to do with both the real and the imaginary offenses.[4]

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[3]Respondent's contention (Br. 12, Note 5) that this is not true, ignores the last paragraph of the court's charge (R. 116-117). Under the charge, a failure to return a verdict as to either count was an acquittal as to that count, and the only negative action the jury could take was to return a verdict of not guilty as to the entire indictment.

[4]The corrective statement elicited from the court (R. 18), besides being meaningless, is qualified by the statement "as I said in the beginning of my charge". In the beginning of

Any argument that the jury did not follow the natural inferences to be drawn from the Charge of the Court, must be based upon speculation of the wildest sort. As against respondent's hypothesis in this regard, petitioner could present numerous theories, on the argument of the merits, and would do so if requested by this court. However, the question is not confined to that ever mysterious realm of what took place in the jury room. The question here is whether or not petitioner will have his day in court on a question of law involving his right to a jury trial. Petitioner submits that this is no mere "technical error, defect or exception."

Respectfully submitted,

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his charge (R. 112) he erroneously stated that the overt acts were substantive offenses, and that the question was whether or not the defendants had committed them.